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No. 08-1102

IN THE
Supreme Court of the United States

DANIEL AND ANDREA MCCLUNG,
Petitioners,

v.

CITY OF SUMNER, WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In response to historic flooding in the early 1990s, the Sumner City Council engaged in comprehensive stormwater management planning. After undertaking detailed technical studies and holding a series of public meetings, the City Council adopted ordinances in 1993 and 1994 to establish generally applicable minimum stormwater infrastructure requirements for all new developments. When petitioners sought a permit for extensive new development in 1994, these requirements were applied to their proposed project, obligating petitioners to install stormwater pipe with greater carrying capacity than the existing pipe. No dedication of real property was required of petitioners. Petitioners neither objected to the stormwater pipe upgrade requirements nor sought to mitigate the financial impact of these requirements through the several mechanisms made available in the City Code. The question presented is:

When generally applicable, legislatively enacted land use regulations not involving land dedications are applied to developments of real property without individualized tailoring through adjudication, is a takings challenge to those regulations properly evaluated using the factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)?

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STATEMENT

Particularly severe rains between 1990 and 1992 caused widespread flooding in Sumner, Washington. *See* Pet. App. 4a-5a, 28a. To solve the flooding problem, the City (respondent) undertook several technical studies and held a series of public hearings in order to craft a comprehensive stormwater management strategy. The resulting Comprehensive Stormwater Plan had three distinct components. The first was respondent's commitment to construct a stormwater drainage trunk line to collect and transmit stormwater runoff from a large service area in East Sumner (an area that includes petitioners' property). The trunk line was financed by more than $3 million in bonded indebtedness to be repaid over 20 years. Respondent adopted the Stormwater General Facility Charge ("GFC"), which is calculated according to the total amount of impervious surface on each parcel, to pay for the construction. *See id.* at 28a. The second component of respondent's comprehensive strategy to address flooding was to revise the City Code to require that all new developments be served by stormwater pipes with a minimum 12-inch diameter. *See id.* at 5a. The third and final component of the comprehensive plan was to outline a strategy for upgrading certain stormwater pipes in key parts of the City to pipes with 18-, 21-, and 24-inch diameters. *See id.*

In 1993 and 1994, respondent officially adopted the Comprehensive Stormwater Plan by enacting Ordinances Nos. 1603 and 1625. *See id.* at 5a, 11a n.3, 28a, 37a. Ordinance No. 1603, now codified at section 13.48 of the Sumner Municipal Code, expressly adopted the King County Surface Water Design Manual ("Water Design Manual") as applicable to all

new development in the City. This Manual, which is used by many local jurisdictions in Western Washington, establishes the minimum stormwater pipe size as 12 inches in diameter for all new development in the City. It also recommends future upgrades to 18-, 21-, or 24-inch stormwater lines underneath properties in East Sumner to ensure proper and effective drainage of that area. Ordinance No. 1625 – the Comprehensive Plan for the City of Sumner, adopted in April 1994 – ratified and codified the City's Comprehensive Stormwater Plan as part of the overall comprehensive planning document.

Petitioners Daniel and Andrea McClung own several lots in East Sumner. In May 1994, petitioners approached respondent about their plans to develop a commercial project known as "Main Street Plaza." *See* Pet. App. 5a. These plans – encompassing the four houses located on petitioners' East Sumner parcel – called for the demolition of one of the houses, the construction of a Subway sandwich restaurant in its place, and the conversion of a gravel alleyway at the rear of the parcel into an asphalt parking area. *See id.* Paving the alleyway would add impervious surface cover, exacerbating the stormwater runoff problem.

Before approving petitioners' building permit, the City discovered that the stormwater pipe serving petitioners' property was 12 inches in diameter for the first four feet, and then only six inches in diameter for more than 350 feet. *See id.* The six-inch pipe did not comply with the Water Design Manual provisions adopted by Ordinance No. 1603, which required a *minimum* pipe size of 12 inches for all new development in Sumner. *See id.* Moreover, the Comprehensive Stormwater Plan called for further upgrades

to 24-inch pipe in this area of East Sumner to handle large-area drainage problems and to address future flooding issues in the area. *See id.* at 29a.

On December 27, 1995, respondent sent petitioners a letter explaining that the existing stormwater line was deficient and that "[a]s a developer you are required to install a 12-inch line at a minimum." *Id.* at 56a. Respondent further noted that the Comprehensive Stormwater Plan required upgrading the pipe to 24 inches. Respondent did not require petitioners to pay the cost of upgrading to the 24-inch line. Rather, it offered to fully offset the cost of upgrading from a 12-inch to a 24-inch line by waiving certain generally applicable development fees. *See id.* ("To offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm drainage systems for both the development and the Subway Shop."). Petitioners did not respond to respondent's letter and proceeded to install a 24-inch pipe. *See id.* at 30a; *see also id.* at 6a (explaining that petitioners "voic[ed] no objection to the 24-inch pipe installation requirement"). Respondent waived the applicable GFC charges and fees, as promised. Petitioners subsequently completed the rest of the permitting and construction process, as well as their Main Street Plaza project, and the development has been open and operational for nearly 13 years.

On April 27, 1998, petitioners filed suit in Washington state court asserting violations of Washington state law. *See id.* On September 3, 1999, they filed a motion for summary judgment asking the trial court to determine as a matter of law that the GFC

imposed on them by the City was an illegal charge under the Revised Code of Washington. Petitioners' motion was denied on October 1, 1999. *See id.*

On November 1, 1999, petitioners sought discretionary review of the trial court's denial of their summary judgment motion. The Washington Court of Appeals denied the request. *See id.* at 26a. Petitioners filed a motion to modify the court's ruling on April 11, 2000. Respondent entered into a stipulation with petitioners agreeing that "the only issue before the Washington Court of Appeals was the alleged violations of Revised Code of Washington 82.02.020." *Id.* at 26a, 27a. On May 4, 2001, the court of appeals affirmed the trial court's denial of petitioners' motion for summary judgment and remanded to the trial court for further proceedings.

On March 28, 2002, four years after they filed their original complaint, petitioners filed a motion to amend their complaint. The proposed amendment sought to add, for the first time, federal and state takings claims, as well as civil rights and attorney's fees claims under 42 U.S.C. § 1983 and § 1988. The proposed amended complaint, also for the first time, demanded damages in excess of $50,000. The trial court denied the proposed amendment on April 12, 2002. A bench trial commenced on June 12, 2002, and at trial petitioners attempted to relitigate the legality of the City's stormwater GFC, claiming that the Washington Court of Appeals' decision denying summary judgment for petitioners was erroneous. Petitioners also challenged the legality and constitutionality of the stormwater pipe upgrade obligation. The trial court rejected these arguments and limited the issue at trial to whether respondent's stormwater GFC was discriminatory as applied to petitioners.

At the conclusion of the bench trial, on October 22, 2002, the Pierce County Superior Court ruled in respondent's favor, concluding in pertinent part that: (1) the City had authority to impose the stormwater GFC under Chapter 35.67 of the Revised Code of Washington; (2) the stormwater GFC as applied to petitioners complied with Chapter 35.67; (3) the stormwater pipe upgrade obligations imposed on petitioners were not stormwater GFC charges; and (4) petitioners' claims should be dismissed. Final judgment was entered on October 30, 2002, dismissing petitioners' claims with prejudice.

Petitioners sought direct review in the Washington Supreme Court (bypassing the court of appeals). The Washington Supreme Court declined review and transferred the case to the court of appeals. *See* Pet. App. 28a. The court of appeals issued an unpublished second opinion, *Tapps Brewing Co. v. City of Sumner*, No. 31959-4 II, 2005 WL 151932 (Jan. 25, 2005), reversing and remanding to the trial court for consideration of petitioners' challenge to the legality of the stormwater pipe upgrade obligation. *See* Pet. App. 28a. The court of appeals also directed that petitioners be permitted to amend the complaint to clarify the constitutional claims. *See id.*

On January 16, 2006, the City timely removed the case to federal court. Petitioners then filed "Plaintiff's Motion for Summary Judgment on the Federal Takings Issues." *See id.* at 31a. Respondent sought summary judgment on all remaining claims. On February 16, 2006, the district court entered its order granting respondent's motion for summary judgment and denying petitioners' partial summary judgment motion on the federal takings claim.

Judgment based upon that order was entered on February 21, 2007.

Petitioners appealed the district court's order to the Ninth Circuit. Their argument on appeal was limited solely to the alleged unconstitutionality of the stormwater upgrade condition under the Fifth Amendment to the United States Constitution. *See* Appellants' Opening Brief, *Tapps Brewing Inc. v. City of Sumner*, No. 07-35231 (9th Cir. filed Sept. 25, 2008) (making no state-law argument and citing no state cases concerning the constitutionality of the stormwater upgrade obligation).

On September 25, 2008, the Ninth Circuit affirmed. The court assumed without deciding that petitioners' federal takings claim was ripe, *see* Pet. App. 10a, and held that respondent's legislatively adopted and generally applicable requirement that all new development be conditioned on the installation of 12-inch stormwater pipes should be analyzed under the standard articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *see* Pet. App. 10a-19a. The Ninth Circuit also affirmed the district court's conclusion that petitioners had "impliedly contracted to install a 24-inch pipe." *Id.* at 19a.

On December 1, 2008, the Ninth Circuit denied petitioners' motion for rehearing *en banc*. *See id.* at 3a.

REASONS FOR DENYING THE PETITION

Petitioners' primary argument in support of their petition for a writ of certiorari is that the decision below misapplies a settled Supreme Court precedent and conflicts with a 2004 decision of the Texas Supreme Court. *See* Pet. 8-12. Even if petitioners' claims were correct, the decision below would not warrant this Court's review. In fact, however, petitioners are wrong on both counts.

A. The lower courts are in widespread agreement about the application of the Fifth Amendment to generally applicable development conditions.

1. The Ninth Circuit's interpretation and application of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is correct. *Dolan* expanded on this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that land-use exactions imposed as conditions on development permits must bear an essential nexus to legitimate government interests implicated by the proposed development. In *Dolan*, this Court addressed the question reserved in *Nollan*: "what is the required degree of connection between the exactions and the projected impact of the proposed development[?]" *Dolan*, 512 U.S. at 386. In adopting the rough-proportionality standard, the Court held that the city's demand that Dolan "deed portions of [her] property to the city" for a public greenway and pedestrian/bicycle pathway as conditions on her building permit were unconstitutional takings because the city had not demonstrated that the land exactions were roughly proportional to the burdens imposed by the proposed development. *Id.* at 385, 391. The Court made clear that the facts of *Dolan*

were different from traditional takings cases in two important respects:

> First, [traditional takings cases] involve[] essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of her property to the city.

Id. at 385.

This Court reaffirmed the importance of the second of these distinctions in *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687 (1999). In that case, the Court explained, "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702.

The infrastructure upgrade at issue in this case, in contrast to the one at issue in *Dolan*, shares neither of these distinguishing characteristics. It is legislative in nature, not adjudicative, having been imposed as a result of a blanket legislative determination applicable to all new development in the City. As the court below stated, "the McClungs attempt to recast the facts as involving an individualized, discretionary exaction as opposed to a general requirement imposed through legislation. . . . The facts do not support the McClungs falling within the former category." Pet. App. 18a. And it does not require petitioners to deed any portion of their property to the City or dedicate any portion of their property to

public use.[1] Thus, the decision below cannot possibly represent a misapplication of the settled *Dolan* rule.

2. The judgment below does not conflict with the decision of the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004). In *Town of Flower Mound*, the Texas Supreme Court applied *Dolan*'s rough-proportionality standard to a permit condition requiring the developer to improve a public street adjacent to its proposed development. After considering the town's argument that *Dolan* should not apply because the street improvement requirement was legislative rather than adjudicative in nature, the Texas Supreme Court expressly declined to decide whether legislatively imposed conditions are subject to *Dolan*'s rough-proportionality standard. *Id.* at 641 ("[w]e need not risk error . . . by undertaking to decide here in the abstract whether the *Dolan* standard should apply to all 'legislative' exactions"). Instead, the court determined that the *Dolan* standard was applicable in that case because the condition was essentially adjudicative in nature – having been imposed "based on general authority taking into account individual circumstances." *Id.* In particular, "the Town was authorized to grant, and did grant,

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[1] The stormwater pipe upgraded by petitioners runs through an easement retained by the City when it vacated the alley for petitioners' benefit. The vacation of the alley and the easement in favor of the City were accomplished through Ordinance No. 1620, adopted by the Sumner City Council on March 21, 1994. *See* Pet. App. 51a-54a. The existence of the easement thus predated the permit application and the consequent requirement that petitioners upgrade the pipe to 12 inches. Accordingly, this case does not involve a dedication of private real property to public use.

exceptions to the general requirement that roads abutting subdivisions be improved to specified standards. [The developer] applied for an exception and was refused, but the Town nevertheless considered whether an exception was appropriate." *Id.*

In contrast, the upgrade requirement imposed on petitioners – a City-wide development requirement promulgated by the Sumner City Council after public debate and deliberation – is quintessentially legislative in nature. The Sumner Municipal Code ("SMC") requires that "[s]tormwater management measures . . . be designed and constructed in accordance with the standards and specifications as set forth in *Surface Water Design Manual* published by King County." SMC 13.48.590. The Water Design Manual, in turn, mandates a minimum 12-inch stormwater pipe size for every new or modified development in the City of Sumner.

Moreover, petitioners failed to seek a variance from the general requirement or to avail themselves of any of the mechanisms by which the minimal financial burden of the general requirement could be mitigated. Under the Sumner City Code, the City engineer is authorized to grant a variance from any of the standards contained in the Manual "if there are exceptional circumstances applicable to the site such that strict adherence to the provisions of these regulations will result in unnecessary hardship and not fulfill the intent of this chapter." SMC 13.48.480. In addition, the SMC contains several provisions permitting developers to seek payments from other property owners designed to offset any potential financial burdens of complying with the minimum 12-inch pipe requirement.

For example, SMC 13.48.500(D) establishes a right to enter into a "latecomer's agreement," which is "an agreement between the city and a property owner for the sole purpose of reimbursing such owner for costs incurred by that owner for the installation of a public storm drainage system." Similarly, SMC 13.48.610 *requires* the City to allow a developer to enter into a payback agreement under SMC 13.48.500(D) when its development is conditioned on the installation of stormwater conveyance lines "larger than required to serve adjacent properties." The payback agreement compels other property owners to share in the cost of the upgrade. *See* SMC 13.40.070. Finally, in some circumstances in which a developer is asked to install pipes larger than necessary to serve adjacent properties, the City's stormwater drainage utility will contribute to the cost of constructing the upgrade. *See* SMC 13.48.610. Petitioners failed to pursue *any* of these mechanisms for individualizing the application of the general 12-inch pipe requirement to the particularities of their property or development plans. Because this case does not involve a condition "based on general authority taking into account individual circumstances," *Town of Flower Mound*, 135 S.W.3d at 641, the decision below does not conflict with the Texas Supreme Court's decision in *Town of Flower Mound*.

3. Petitioners' attempt to bolster their claim of a split among the lower courts with a long stringcite of allegedly conflicting cases buried in footnote 7 is also unavailing. Remarkably, four of the six lower court cases cited in that footnote are decisions by intermediate appellate state courts (and two are from intermediate courts in the same state). *See Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172

(Wash. Ct. App. 2000), *aff'd on other grounds*, 49 P.3d 860 (Wash. 2002); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1995); *United Dev. Corp. v. City of Mill Creek*, 26 P.3d 943 (Wash. Ct. App. 2001); *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994). Even if those decisions could be said to conflict with the decision below, they would not establish any conflict of authority warranting certiorari.[2]

And, while the two remaining cases in footnote 7 of the petition are decisions of state courts of last resort, one predates *Nollan* and *Dolan* and both rest on their respective state constitutions, not the Fifth Amendment to the federal Constitution. *See Simpson v. City of North Platte*, 292 N.W.2d 297, 299 (Neb. 1980) ("the ordinance is in violation of the Nebraska Constitution"); *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 389 (Ill. 1995) (applying the "specifically and

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[2] Moreover, in attempting to establish a conflict of authority, petitioners mischaracterize the holdings of these intermediate court decisions. For example, petitioners claim that the Appellate Court of Illinois subjected a legislative determination to *Nollan/Dolan* scrutiny in *Amoco Oil*. Pet. 10 n.7. The court itself, however, stated that "the so-called 'ordinance' at issue here did not itself reflect a uniformly applied legislative policy. Indeed, the dedication requirement was clearly site-specific and adjudicative in character." 661 N.E.2d at 390. Similarly, petitioners rely on *Benchmark Land*. However, in that case the Washington Supreme Court reversed and remanded in light of this Court's decision in *City of Monterey*. After the Washington Court of Appeals applied *Nollan/Dolan* scrutiny again, the Washington Supreme Court ruled that the required street upgrade was invalid under the applicable state statute and declined to reach the constitutional issue. *See Benchmark Land Co. v. City of Battle Ground*, 49 P.3d 860 (Wash. 2002).

uniquely attributable" test under the state constitution).[3]

4. Indeed, in trying to demonstrate the existence of a deep conflict involving many courts, petitioners even overstate the extent to which lower courts *agree* with the decision below. Of the five cases cited in footnote 8 of the petition, only two involve holdings that directly address the question whether *Nollan/Dolan* scrutiny applies to purely legislative enactments. In *San Remo Hotel L.P. v. City & County of*

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[3] *Amici* Pacific Legal Foundation, The Cato Institute, and the Building Industry Association of Washington fare no better in their attempt to establish a split of authority. Six of the seven cases cited by *amici* in support of the proposition that some lower courts apply *Nollan/Dolan* scrutiny to legislative enactments (in conflict with the decision below) are entirely off-point. One case involves the fact-bound application of state law. *See City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) ("This contract action came before the district court in exercise of its diversity jurisdiction."). Another applied a state constitutional standard. *See Northern Illinois Home Builders Ass'n*, 649 N.E.2d at 389 (applying the "specifically and uniquely attributable" test). A third involved dedication of an interest in real property, which *Dolan* makes clear presents distinct issues from other types of conditions. *See Curtis v. Town of South Thomaston*, 708 A.2d 657, 659-60 (Me. 1998) (applying *Dolan* to the requirement that developers construct a fire pond and grant the city a permanent easement to access the pond for fire suppression purposes). In the fourth case, the New York Court of Appeals invalidated a rent stabilization program for the benefit of employees of Lenox Hill Hospital because it did not substantially advance a legitimate state interest. *See Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994) ("[w]e conclude that chapter 940 fails the test of substantially advancing a legitimate State interest"). Two cases involve particularized, adjudicatively imposed conditions. *See Trimen Dev. Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) ("King County's assessment of fees in lieu of dedication are specific to the site"); *see also Town of Flower Mound*, *supra*.

San Francisco, 41 P.3d 87 (Cal. 2002), the California Supreme Court declined to apply *Nollan/Dolan* to the city's residential hotel conversion and demolition ordinance ("HCO"), concluding that the "'sine qua non' for the application of *Nollan/Dolan* scrutiny is . . . the 'discretionary deployment of the police power' in 'the imposition of land-use conditions in individual cases.'" *Id.* at 105. Because "[t]he HCO is generally applicable legislation . . . that . . . applies, without discretion or discrimination, to every residential hotel in the city" and therefore "does not provide City staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee," the court declined to subject it to *Nollan/Dolan* scrutiny. *Id.* at 104.

Similarly, in *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), an association of companies managing or owning surface parking lots in the city brought action against the city, seeking declaratory and injunctive relief, challenging the constitutionality of a city zoning ordinance requiring curbs, landscaping, and trees in surface parking lots. The Georgia Supreme Court held that *Dolan* was inapplicable because "[h]ere the city made a legislative determination with regard to many landowners and it simply limited the use the landowners might make of a small portion of their lands" in contrast to the "individualized determination" at issue in *Dolan*. *Id.* at 203 n.3.

The other three cases cited in footnote 8 of the petition do not directly address the application of *Nollan/Dolan* scrutiny to generally applicable development conditions. *See Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997) ("In light of our holding that the reason-

ableness of the amount of the Scottsdale fee was not raised in the trial court, whether that fee is roughly proportional to the burden imposed on the community was likewise not in question."); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (rejecting the application of *Dolan* to the city's trafficway improvement impact fee because "it does not appear that the issue was presented to the district court"); *City of Olympia v. Drebick*, 126 P.3d 802, 806, 808 (Wash. 2006) (declining to look to *Nollan/Dolan* to determine "what the legislature intended when it required that the facilities funded by the impact fees be *reasonably related and beneficial* to the particular development seeking approval").

The unavoidable fact is that state courts of last resort and courts of appeals simply have not addressed whether *Nollan/Dolan* scrutiny applies to generally applicable development conditions in sufficient number to establish any meaningful pattern, and the few that have addressed the issue are in substantial agreement. Until more lower courts weigh in, and unless the pattern that emerges demonstrates an irreconcilable split of authority, this Court's review is not warranted.

B. This case does not involve a monetary exaction, and therefore does not implicate any split of authority that might exist regarding the application of the Fifth Amendment to purely monetary exactions.

Having failed to establish the existence of a split of authority on the issue of legislative exactions, petitioners attempt to shoehorn this case into another area of Fifth Amendment jurisdiction where

they allege a conflict. Not only does the case not fit, but the alleged conflict is overstated.

1. Petitioners assert that, "[a]s an alternative ground for its holding, the Ninth Circuit ruled that heightened scrutiny does not apply to monetary exactions." Pet. 13. In fact, the Ninth Circuit plainly stated: "[w]e further reject the McClungs' characterization of Ordinance 1603 as creating a monetary exaction." Pet. App. 17a.[4] Thus, even if petitioners could establish a division of authority on the second question presented in the petition, the decision below would not implicate that conflict.[5]

2. Petitioners also overstate the extent of any lower court disagreement concerning the application of the Fifth Amendment to monetary exactions, and they confuse and mischaracterize the holdings of the cases they cite in support of their claim that the lower courts are divided.

a. Petitioners cite only four cases from courts of appeals or state courts of last resort in support of their claim that "[m]ost courts . . . disagree" with the proposition that *Nollan/Dolan* scrutiny "does not apply to monetary exactions," Pet. 13, and two of those cases are completely inapposite. In *Rose Acre*

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[4] While the court below went beyond this finding and offered its opinion that "even if the upgrade could be viewed as a monetary exaction . . . *Nollan/Dolan* still would not apply," Pet. App. 17a, this observation was not necessary to the decision below (indeed, it was counterfactual), and therefore the case does not provide an appropriate vehicle for reaching the issue presented by the second question.

[5] Because this case does not involve a monetary exaction, it also does not implicate the question presented in *Empress Casino Joliet Corp. v. Alexis Giannoulias, Treasurer of Illinois*, No. 08-945, which is currently pending before this Court.

Farms, Inc. v. United States, 373 F.3d 1177 (Fed. Cir. 2004), for example, the Federal Circuit did not address a monetary exaction. Rather, the challenged restriction there arose from a United States Department of Agriculture regulation designed to address the threat of salmonella in table eggs. As a result of the regulation, eggs from Rose Acre Farms were diverted from the table egg market to the breaker egg market for a period of 21 months, resulting in a loss of income.[6] The Federal Circuit appropriately analyzed that restriction on the use of property under the *Penn Central* factors. The court did not even mention monetary exactions or *Nollan/Dolan*.

Nor did *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), involve the application of *Nollan/Dolan* to monetary exactions. *Anderson* involved multifaceted constitutional challenges to many provisions of Kentucky election law, one of which required political campaigns to turn over unexpended funds to the Commonwealth at the end of the campaign. The Sixth Circuit addressed the takings issues raised by that provision in one paragraph, concluding that the turn-over requirement constituted a *per se* taking under *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). *Nollan/Dolan* played no part in the decision of that case.

That leaves just two cases standing in supposed support of petitioners' claim that "[m]ost courts" have applied *Nollan/Dolan* to monetary exactions. *See Town of Flower Mound, supra*; *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). Both of these

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[6] Table eggs are consumed without pasteurization, while breaker eggs are used for products that are pasteurized before being sold. *See Rose Acre Farms*, 373 F.3d at 1181.

remaining cases stand for the proposition that some monetary exactions – in particular, "special, discretionary permit conditions [imposed] on development by individual property owners" – are subject to *Nollan/Dolan* scrutiny. *Ehrlich*, 911 P.2d at 447 ("[W]hen a local government imposes special, discretionary permit conditions on development by individual property owners – as in the case of the recreational fee at issue in this case – *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard."); *Town of Flower Mound*, 135 S.W.3d at 640-42 (applying *Nollan/Dolan* scrutiny because the exaction at issue in that case was individualized, not "legislative").

b. The lower courts are not in disagreement over the proposition at issue in *Ehrlich* and *Town of Flower Mound* that takings challenges to individualized monetary exactions imposed adjudicatively as permit conditions on particular development proposals should be analyzed under the heightened standards articulated in *Nollan/Dolan*. As discussed above, the decision below does not conflict with *Town of Flower Mound* or *Ehrlich* because this case does not involve a monetary exaction, notwithstanding petitioners' attempts to characterize it as such. Nor do the other cases cited by petitioners support their claims of a conflict. The three principal cases they cite for the proposition that "[s]ome courts . . . *suggest* that *Nollan/Dolan* scrutiny does not apply to monetary exactions,"[7] Pet. 13 (emphasis added), are all

[7] The strength of petitioners' evidence of a disagreement among lower courts is belied by their use of the verb "suggest." Pet. 13.

from the Ninth Circuit, as is the decision below. These cases do not conflict with the holdings in *Town of Flower Mound* and *Ehrlich*. Rather, the Ninth Circuit's established jurisprudence is completely consistent with the proposition that *Nollan/Dolan* scrutiny is applicable to individualized, adjudicative monetary exactions. In *San Remo Hotel L.P. v. City & County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), the Ninth Circuit actually declined to address the landowner's federal takings claim, holding that it was precluded by the state court resolution of the state-law takings claim.[8] The court noted, however, that Ninth Circuit jurisprudence did not apply *Nollan/Dolan* scrutiny to generally applicable monetary exactions "across the board," but that a different rule would be required if the fees had been tailored and individualized. *Id.* at 1097. In fact, the Ninth Circuit made clear in that case that there was no disagreement between itself and the California Supreme Court on this issue. *See id.* ("[T]he California Supreme Court's analysis was thus the equivalent of the approach taken in this circuit.").

Similarly, in *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), the Ninth Circuit acknowledged that *Nollan/Dolan* scrutiny would be appropriate for an as-applied challenge to monetary exactions, but declined to engage in such close scrutiny as part of a facial challenge to legislation authorizing such exactions. *See id.* at 811 ("If this were an as-applied challenge we would determine the [fee's] effect on each parcel of land. . . . Each as-applied regulatory takings claim must be evaluated independently to

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[8] This Court affirmed the Ninth Circuit's holding in *San Remo Hotel L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005).

determine whether the total exaction is roughly proportional to the harm caused by each development. Because in a facial claim we do not analyze the exactions, *Dolan*'s test for when the exaction costs too much does not apply.").

Finally, petitioners inexplicably rely on *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), for their claim that some courts reject the application of *Nollan/Dolan* to monetary exactions. Not only does that case predate *Dolan*, but the Ninth Circuit actually *applied* a heightened standard equivalent to the *Nollan* standard to the challenged fee in that case. *See id.* at 875 ("[T]he Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*. We find that the nexus between the fee provision here at issue . . . and the burdens caused by the commercial development is sufficient to pass constitutional muster.").[9]

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[9] Petitioners' mischaracterization of the holding in *Commercial Builders* might be traceable to a parenthetical in the Ninth Circuit's decision below, in which the court mistakenly claims that the *Commercial Builders* panel rejected the application of *Nollan* to the challenged monetary exaction. *See* Pet. App. 18a. In fact, the Ninth Circuit in *Commercial Builders* rejected an overly strict interpretation of *Nollan* and applied the appropriate essential nexus test to the challenged exaction. *See* 941 F.2d at 875 ("We therefore agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.").

C. This case presents a poor vehicle to address the questions presented.

1. Potentially significant ripeness issues make this case a particularly poor vehicle for reaching the issues on which petitioners seek this Court's review. Claims that a governmental action amounts to an unconstitutional taking without just compensation are subject to the dual ripeness requirements set forth by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Under the first prong of *Williamson County*, the claimant must demonstrate that the government entity charged with implementing the law has reached a final decision regarding the law's applicability to the property at issue. *See id.* at 186. In particular, this prong requires the claimant to pursue administrative measures made available in the regulatory scheme to tailor the facial requirements to the claimant's property. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736-37 (1997). Under the second *Williamson County* prong, the claimant must demonstrate that he or she has sought and been denied just compensation for the taking through the procedures provided by the state for doing so. *See* 473 U.S. at 194. Petitioners' claim is not ripe under either prong.

As an as-applied challenge, petitioners' claim does not satisfy the first prong of the *Williams County* standard.[10] Petitioners originally described their

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[10] Petitioners have vacillated between characterizing their claim as a facial and an as-applied challenge to the City's required stormwater pipe upgrade. *See* Pet. App. 34a ("Plaintiffs originally cast their claims as 'as applied' claims. Plaintiffs later attempt to re-cast their claims as facial or categorical taking claims.") (citations omitted). This is not surprising, as

claim as "as-applied." When it became clear that such a characterization would raise serious jurisdictional ripeness issues, they attempted to re-cast the exact same claim as "facial." The district court saw through this maneuver and evaluated petitioners' takings claim as an "as-applied" challenge to the upgrade requirement. *See* Pet. App. 35a. As noted above, the City Code provides extensive mechanisms by which the generally applicable 12-inch upgrade requirement can be tailored to individual landowners. By failing to pursue these mechanisms, petitioners have failed to ripen their as-applied challenge.

Moreover, petitioners' claims are not ripe under the second prong of *Williamson County*, because they did not pursue their available state-law remedies in the Ninth Circuit. The Washington State Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." Wash. Const. art. I, § 16. As the district court noted, "[t]he Washington Supreme Court has established a two-part test applicable to all claims of regulatory takings of property under Article 1, section 16," and this test is distinct from federal takings jurisprudence. Pet.

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petitioners' failure to pursue any available mechanisms to waive or mitigate the financial impact of the required upgrade has placed them on the horns of a dilemma: if they are raising an as-applied challenge to the condition, it is not ripe and therefore Article III courts lack jurisdiction; if they are raising a facial challenge to the ordinance, their takings claim faces an "uphill battle," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987), and any possible assertion that the lower courts are in conflict evaporates, because the other cases that are purportedly a part of the conflict involve as-applied challenges.

App. 46a ("The inquiry first asks whether the challenged regulation protects the public interest in health, safety, the environment or fiscal integrity. The second inquiry is whether the regulation destroys or derogates any fundamental attribute of ownership . . . .") (citations and internal quotation marks omitted). Petitioners raised a state constitutional challenge to the required upgrade in state court and pursued that challenge in the federal district court after removal. The federal district court ruled against petitioners on the state constitutional issue. *See id.* at 45a-47a. Petitioners did not appeal their state constitutional claim to the Ninth Circuit, however, thereby failing fully to pursue their state-law claim for compensation and depriving this Court of jurisdiction over their federal takings claim.

The Ninth Circuit declined to resolve the ripeness issue, providing this Court with no guidance regarding the proper application of *Williamson County* to the facts of this case. *See* Pet. App. 10a ("Accordingly, we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the takings claim is ripe in order to address the merits of the appeal."). Thus, to reach the questions presented in the petition, this Court would have to determine (1) whether petitioners are raising a facial or an as-applied takings challenge; (2) whether the decision rendered by respondent was "final" notwithstanding petitioners' failure to seek a variance, waiver, or other mitigating measures; and (3) whether a state has denied just compensation for a taking when a claimant has received an initial adverse determination from a *federal* court interpreting that state's law and has failed to appeal that decision.

2. Finally, in addition to the impediments posed by the lurking ripeness concerns, this case raises what petitioners themselves concede to be a "more novel question" that "calls for the Court's consideration as a necessary corollary to resolving the first two questions." Pet. 7. This "more novel question" involves the scope and application of the unconstitutional conditions doctrine, and, as petitioners admit, it stands in the way of the Court's reaching the first two questions presented in the petition.

Both the district court and the Ninth Circuit held that petitioners voluntarily agreed to install 24-inch pipe rather than 12-inch pipe in exchange for the waiver of fees and charges associated with petitioners' proposed development in an amount equal to the cost of that upgrade. *See* Pet. App. 19a-21a, 44a-45a. The Ninth Circuit based its holding on a careful consideration of the state law of implied contracts. *See id.* at 19a-21a. Petitioners ask this Court to reverse the Ninth Circuit's application of state law to the facts of this case, and then proceed to resolve an unconstitutional conditions argument that was not addressed by the courts below. *See id.* at 21a, 44a-45a. Moreover, petitioners concede that the Court's interpretation of Washington state law and its resolution of a "novel question" of constitutional law not resolved below is a "necessary corollary to resolving the first two questions." Pet. 7. Petitioners' arguments in this regard are sufficient in their own right to establish that this case is an exceedingly poor vehicle for reaching the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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